

CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29

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NO. 8

This issue contains:

U.S. Customs Service

T.D. 95-15

General Notices

U.S. Court of International Trade

Slip Op. 95-10 Through 95-15

Abstracted Decisions:

Classification: C95/18 and C95/19

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 95-15)

ACCEPTANCE OF NEW BONDS UNDERWRITTEN BY AMERICAN BONDING COMPANY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice informs the public that new bonds underwritten by the American Bonding Company will be accepted in the Miami District, by virtue of the District Director's lifting of sanctions imposed under 19 CFR 113.38. This notice thus revokes the notice which was published in the CUSTOMS BULLETIN as T.D. 94-96 on December 14, 1994, regarding the initial imposition of such sanctions upon the company.

FOR FURTHER INFORMATION CONTACT: Nelly Foreiter, Fines, Penalties and Forfeiture Officer, (305) 876-6940.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 14, 1994, a notice was published in the CUSTOMS BULLETIN as T.D. 94-96, informing the public that no new single transaction or continuous bonds underwritten by the American bonding Company would be accepted by the Miami District pursuant to 19 CFR 113.38, in view of the company's being significantly delinquent in payment of its outstanding debts. However, in light of an offer in compromise recently made by the company and accepted by Customs in payment of such debts, the District Director has since lifted the sanctions previously imposed, thereby permitting the acceptance of new bonds from the company.

The District Director, by letter dated January 18, 1995, notified the company of Customs acceptance of its offer in compromise. The District Director has also notified Customs Headquarters of its action in this matter. This notice, which thus revokes T.D. 94-96, hereby notifies the public of this action.

Dated: February 2, 1995.

WILLIAM G. ROSOFF,
Acting Director,
Commercial Rulings Division.



U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,

Washington, DC, February 7, 1995.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF COSMETIC WIPES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of cosmetic wipes. Notice of the proposed revocation was published January 4, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 1.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 24, 1995.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Classification Branch, (202) 482-7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 4, 1995, Customs published in the CUSTOMS BULLETIN, Volume 29, Number 1, proposing to revoke Headquarters Ruling Letter

(HRL) 955790 (2/17/94), concerning the tariff classification of cosmetic wipes. No comments were received from interested parties.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking HRL 955790 to reflect proper classification of the cosmetic wipes under subheading 4818.20.0040, HTSUSA, which provides for handkerchiefs, cleansing or facial tissues, of paper pulp. HRL 956875, revoking HRL 955790, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: February 6, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, February 6, 1995.

CLA-2 CO:R:C:T 956875 SK
Category: Classification
Tariff No. 4818.20.0040

TIEN-CHIN LIANG LOU
VERSEAU INTERNATIONAL
240 East 76th ST., #3M
New York, NY 10021

Re: Revocation of HRL 955790 (2/17/94); classification of a cosmetic wipe; lab test reveals cosmetic wipe to be over 75 percent by weight of pulp fibers; 4818.20.0040, HTSUSA.

DEAR SIR:

On February 17, 1994, this office issued you Headquarters Ruling Letter (HRL) 955790 in which Customs classified a cosmetic wipe under subheading 5603.00.9090, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Since the issuance of that ruling, this office has been made aware of a factual error which has the effect of changing the classification of the subject merchandise. Accordingly, HRL 955790 is hereby revoked and our analysis follows.

Facts:

The articles at issue are "cosmetic puffs" or "cosmetic wipes," and are generally used for removing make-up. The individual wipes are sheets of tissue-like material, measuring approximately 2 inches by 6 inches, but folded in half to measure approximately 2 inches by 3 inches. The wipes are made from Japanese raw material which is cut to size and put up in 90-count packages in Taiwan.

In HRL 955790, these products were classified in subheading 5603.00.9090, HTSUSA, as nonwoven textiles. This classification was based on the erroneous assumption that the cosmetic wipes consisted of a blend of cotton and rayon textile fibers.

Since the issuance of HRL 955790, another sample of the subject merchandise was submitted to the Customs laboratory for fiber analysis. The lab test revealed that the cosmetic wipes consisted of over 75 percent bleached pulp fibers and less than 25 percent textile fibers by weight.

Issue:

Whether the subject cosmetic wipes are classifiable under subheading 5603.00.9090, HTSUSA, as nonwoven textiles, or under subheading 4818.20.0040, HTSUSA, which provides for handkerchiefs, cleansing or facial tissues, of paper pulp?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 4818, HTSUSA, provides for, *inter alia*, cleansing tissues of paper pulp. As a Customs laboratory report yields the finding that the subject merchandise is composed of over 75 percent pulp fibers, and the cosmetic wipes or "puffs" are "cleansing or facial tissues," classification is proper within this heading.

We further note that the change in the tariff classification of the cosmetic wipes does not affect the conclusion in HRL 955790 regarding the country of origin of the wipes for marking purposes. We have consistently held that cutting materials to defined shapes or patterns suitable for use in making finished articles, as opposed to mere cutting to length and/or width which does not render the article suitable for a particular use, constitutes a substantial transformation. In this case, the essential character and use of the cosmetic wipe material is predetermined prior to the processing performed in Taiwan. Thus, the country of origin of the wipes is the country in which the material is formed—Japan.

Holding:

HRL 955790 is modified.

The cosmetic wipes are classifiable under subheading 4818.20.0040, HTSUSA, which provides for, in part, other cleansing or facial tissues and towels, of paper pulp, dutiable at a rate of 4.8 percent *ad valorem*.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

**PROPOSED MODIFICATION OF RULING LETTER RELATING
TO THE TARIFF CLASSIFICATION OF CERTAIN DISPOSABLE
COVERALLS**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a disposable coverall. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before March 24, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION: Cathy Braxton, Textile Classification Branch (202) 482-7048.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a disposable coverall.

In DD 801407, dated September 20, 1994, a disposable coverall was classified in subheading 6210.10.4015 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for overalls and coveralls made up of fabrics of heading 5602 or 5603, but which do not qualify for use in hospitals, clinics, laboratories or contaminated areas. DD 801407 is set forth in Attachment A to this document.

Upon further examination of the subject garment, it is Customs belief that it is a coverall that is specially designed for use in contaminated areas. Therefore, the disposable coverall is properly classifiable in subheading 6210.10.4010, HTSUSA, which provides for garments made up of fabrics of heading 5602 or 5603; nonwoven disposable apparel

designed for use in hospitals, clinics, laboratories or contaminated areas.

Customs intends to modify DD 801407 to reflect the proper classification of the disposable garment under 6210.10.4010, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 957115 modifying DD 801407 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 1, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, September 20, 1994.

CLA-2-02-CL:DD:CP:CB:HO2
Category: Classification
Tariff No. 6210.10.4015

MR. LECO L. CHAO
SUNRISE INDUSTRIES, INC.
TOMSCO HWY. SAFETY EQUIPMENT
P.O. Box 23679-32241
Jacksonville, FL 32257

Re: The tariff classification of a nonwoven, disposable coverall from China and the Philippines.

DEAR MR. CHAO:

This classification decision under the Harmonized Tariff Schedule of the United States (HTS) is being issued in accordance with the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

DATE OF INQUIRY:

August 16, 1994.

DESCRIPTION OF
MERCANDISE:

You have submitted a nonwoven polypropylene disposable coverall for a binding ruling. This coverall has a zipper opening which extends from the neckline to approximately 12 inches above the crotch. It has an attached hood which is elasticized around its opening. The legs extend to cover the shoes of the wearer. The garment is long-sleeved; the sleeves have no tightening at the ends.

HTS PROVISION:

Garments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907: Of fabrics, of heading 5602 or 5603: Other *** Other: Overalls and coveralls.

HTS SUBHEADING:

6210.10.4015.

RATE OF DUTY:

17%.

TEXTILE CATEGORY: 659.

IMPORT RESTRAINTS/
REQUIREMENTS:

Subject to visa requirements based on international textile trade agreements. The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have already been filed, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN F. NELSON,
District Director,

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.

U.S. CUSTOMS SERVICE,

Washington, DC

CLA-2 CO:R:C:T 957115 CAB

Category: Classification

Tariff No. 6210.10.4010

MR. LECO CHAO
SUNRISE INDUSTRIES, INC.
TOMSCO HWY. SAFETY EQUIPMENT
P.O. Box 23679-32241
Jacksonville, FL 32257

Re: Reconsideration of DD 801407 of September 20, 1994; 6210.10.4010 vs. 6210.10.4015.

DEAR MR. CHAO:

This is in response to your request for reconsideration dated September 26, 1994, regarding DD 801407 issued to you on September 20, 1994. The merchandise at issue is nonwoven polypropylene disposable coveralls. A sample was submitted for examination.

Facts:

The merchandise at issue is a disposable coverall constructed of nonwoven spunbonded polypropylene material. The article contains an attached hood with an elasticized opening to provide a tight fit, attached boots which act as foot protection, and a zippered means of closure that runs down the front of the garment.

In DD 801407, the District Director of Cleveland classified the garment in subheading 6210.10.4015 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for overalls and coveralls made up of fabrics of heading 5602 or 5603, but which do not qualify for nonwoven disposable apparel designed for use in hospitals, clinics, laboratories or contaminated areas. You claim that the subject garment does qualify as disposable apparel designed for use in hospitals, clinics, laboratories or contaminated areas; and therefore, is properly classifiable in subheading 6210.10.4010, HTSUSA.

Issue:

Whether the subject garment is designed for use in hospitals, clinics, laboratories or contaminated areas, and thus, classifiable in subheading 6210.10.4010, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the

terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

There is no dispute that the subject garment is classifiable in subheading 6210.10.40, HTSUSA, which provides for garments made up of fabrics of heading 5602 or 5603; other, because they are made of a nonwoven material covered by heading 5603. The issue before us is whether the subject garment meets the criteria of nonwoven disposable apparel designed for use in hospitals, clinics, laboratories or contaminated areas, and is therefore classifiable in subheading 6210.10.4010, HTSUSA.

Customs has consistently stated in prior rulings that in order for a garment to be properly classifiable in subheading 6210.10.4010, HTSUSA, it has to be specially designed for use in "contaminated areas." In addition to the specialized design features, Customs also looks to whether the marketing, advertising, and sale of the garment are directed toward the particular uses for which the garment is claimed to be designed.

In Headquarters Ruling Letter (HRL) 084164, dated September 20, 1989, a nonwoven disposable protective coverall manufactured of Type 1422A Tyvek, a spunbonded fabric which is made of high density polyethylene fibers that are formed into a sheet, was classified in subheading 6210.10.4010, HTSUSA. It was determined that the garment therein was designed for use in "contaminated areas". The coverall had a zippered front, long sleeves, and a collar. Among the contaminants which the garment was designed to protect against were radioactive substances, asbestos, pesticides, and viral agents. In HRL 085360, dated December 13, 1989, Customs concluded that a one-piece coverall constructed of 100 percent spunbonded polypropylene with elastic closures on the wrists, an attached hood and boots, and a seam sewn across the chest was classifiable in subheading 6210.10.4010, HTSUSA. The garment was specially designed for asbestos abatement use.

In this instance, the merchandise at issue has design features which appear to adapt it for use in contaminated areas. These features include the snug-fitting elasticized hood, the attached boots, and the oversized loose-fit of the coverall which fits easily over clothing. The importer contends that the subject coverall is identical to the coverall at issue in HRL 085360. When comparing the subject coverall to the coveralls at issue in the aforementioned rulings, it is apparent that all of the garments have similar construction and styling. These similarities include the high density fabric used to make up the garments, the attached hood and boots, and the overall full body protection produced by the one-piece garments. The imported also states that the subject coverall will be utilized for contaminated areas and will be marketed and sold for use in these particular areas. As a result of the statements as to how the garment will be marketed and advertised as well as the general appearance of the garment, the subject garment is classifiable in subheading 6210.10.4010, HTSUSA.

Holding:

Based on the foregoing, the subject coverall is classified in subheading 6210.10.4010, HTSUSA, which provides for garments made up of fabrics of heading 5602, 5603; nonwoven disposable apparel designed for use in hospitals, clinics, laboratories or contaminated areas. The applicable rate of duty is 17 percent *ad valorem*.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

**PROPOSED MODIFICATION OF RULING LETTER RELATING
TO THE TARIFF CLASSIFICATION OF PAJAMA TOPS AND
BOTTOMS**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of pajama tops and bottoms which are referred to as Styles 9630 and 9631, respectively. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before March 24, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Classification Branch (202) 482-7048.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of pajama tops and bottoms.

In Headquarters Ruling Letter (HRL) 952805, dated January 26, 1993, Customs classified pajama tops and bottoms that were shipped together, as separates in subheading 6207.91.3010 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's other woven cotton sleepwear. HRL 952805 is set forth in Attachment A to this document.

Upon further examination of HRL 952805 and the facts surrounding the importation of the pajama tops and bottoms, it is Customs belief that since the pajama tops and bottoms were matching and imported together in equal numbers, that they are classifiable as a single unit.

Therefore, Styles 9630 and 9631 are properly classifiable in subheading 6207.21.0030, HTSUSA, which provides for men's cotton woven pajamas.

Customs intends to modify HRL 952805 to reflect the proper classification of the pajama tops and bottoms in 6207.21.0030, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 957134 modifying HRL 952805 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 3, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, January 26, 1993.
CLA-2 CO:R:C:T 952805 jb
Category: Classification
Tariff No. 6207.91.1000 and 6207.91.3010

MR. DON STANGO
FOSTER INDUSTRIES INC.
358 Fifth Avenue
New York, NY 10001-2209

Re: Woven cotton kimono; woven cotton pajama top; woven cotton pajama bottom; items packed separately, shipped together and sold separately; subheadings 6207.91.1000 and 6207.91.3010, HTSUSA.

DEAR MR. STANGO:

This is in reply to your letter dated September 24, 1992, concerning the classification of a robe and sleepwear for men under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Samples were submitted to this office for examination and will be returned under separate cover.

Facts:

The first sample, Style number 9632, is a woven cotton kimono. It has a full frontal opening with a self fabric belt closure, three-quarter length sleeves and patch pockets at the waist. The garment is labeled "One Size Fits All".

The second sample, Style number 9630, is a men's woven cotton pajama top. It has a full frontal opening with button closures, short sleeves and a breast pocket.

The third sample, Style number 9631, is a pair of men's woven cotton sleep shorts. It has a fully elasticized enclosed waistband, a fly front opening with a one button closure and side seam pockets.

The three items will be packed separately and shipped together. They will be sold separately but advertised together. All items will be imported from India.

Issue:

Whether the robe, top and shorts are classifiable as men's pajamas, dressing gowns and similar articles of heading 6207, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification is determined first in accordance with the terms of the headings of the tariff and any relative section or chapter notes. Where goods cannot be classified on the basis of GRI 1, the remaining GRI will be applied in the order of their appearance.

Though the kimono is labeled "One Size Fits All", it is imported with sleep shorts that are sized as men's medium. Moreover, the robe is of the same color and pattern as the shorts with which it forms a set. The advertisements provided show similar garments being worn exclusively by men who are also wearing sleep bottoms. Thus, while the robe is "one size", in Customs' opinion, it is designed for men and is therefore classifiable in subheading 6207.91.1000, HTSUSA, which provides for men's woven cotton dressing gowns (See Memo 9522241, dated September 17, 1992; HQ 088489, dated April 18, 1991).

As concerns the top and shorts, in Memo 085944, dated May 10, 1991, Customs stated:

Sets of garments, other than ensembles, that are *en nomine* provided for, i.e., suits, track suits, and pajamas, are in the cases of suits and ski suits, specifically defined, and in the cases of track suits and pajamas, commonly and commercially known as single units comprised of one or more components. Accordingly, those sets of garments are classifiable under General Rule of Interpretation (GRI) 1, HTSUSA, which provides that classification will be determined according to the terms of the headings any pertinent legal notes.

The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories (Guidelines), CIE 13/88, dated November 23, 1988, define pajamas as:

Pajamas are worn by both sexes and all ages. They consist of an upper part, pullover or coat style, with long, short, or no sleeves and a lower part, short, intermediate, or long-trouser like garments or any style panties. The lower part sometimes encloses the feet. Pajamas are sleepwear * * *.

It appears from the *Guidelines* that such garments are one that consist of a two-piece set which provide upper and lower body coverage (See HQ 089367, dated July 31, 1991). In the instant case the two units will be individually tagged and priced, though it is stated that the intent is to promote the sale of the coordinated two-piece set.

Customs has determined in HQ 088423, dated May 20, 1991, that sets of garments that are not packed together at the time of importation are classifiable as suits where, at the time of importation, the importer has the *bona fide* intention to sell the suit components as suits, as evidenced by the documentation in the entry package. The "intent" to which that ruling addresses itself goes beyond a mental intent. The requisite intent is the physical manifestation, evidenced in the way in which the articles are sold. Namely, if they are to be sold as a pajama set, the two components should be tagged and priced as a set and not individual components thereof.

It follows that the woven cotton top and sleep shorts are classified separately in subheading 6207.91.3010, HTSUSA, under the provision for men's other woven cotton sleepwear.

Holding.

The kimono, Style number 9632, is classified in subheading 6207.91.1000, HTSUSA, which provides for men's woven cotton dressing gowns. The applicable rate of duty is 9.5 percent *ad valorem* and the textile category is 350.

The pajama top and bottom, Style numbers 9630 and 9631, respectively, are separately classified in subheading 6207.91.3010, HTSUSA, which provides for men's other woven cotton sleepwear. The applicable rate of duty is 6.5 percent *ad valorem* and the textile category is 351.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, to obtain the most current information available, suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC
CLA-2 CO:R:C:T 957134 CAB
Category: Classification
Tariff No. 6207.21.0030

MR. DON STANGO
FOSTER INDUSTRIES INC.
358 Fifth Avenue
New York, NY 10001-2209

Re: Modification of HRL 952805, dated January 26, 1993; classification of pajama tops and pajama bottoms; Heading 6207, HTSUSA.

DEAR MR. STANGO:

This is regarding Headquarters Ruling Letter (HRL) 952805, dated January 26, 1993 issued to you by Customs concerning the proper tariff classification of several men's garments. The tariff classification was based on the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon further examination of HRL 952805, Customs believes it is in error and should be modified to reflect the correct tariff classification. The correct classification is as follows.

Facts:

The merchandise at issue is Style 9630, a men's woven cotton pajama top and Style 9631, a pair of men's woven cotton sleep shorts. Style 9630 has a full frontal opening with button closure, short sleeves and a breast pocket. The garment is labeled "One Size Fits All". Style 9631 contains a fully elasticized enclosed waistband, a fly front opening with a one button means of closure and side seam pockets. The subject articles will be packed separately and shipped together. The will be sold separately but advertised together.

In HRL 952805, Customs classified Styles 9630 and 9631 as separates in subheading 6207.91.3010, HTSUSA, which provides for men's other woven cotton sleepwear. Since the issuance of HRL 952805, Customs has had occasion to review it and believes that Styles 9630 and 9631 are pajamas and are properly classifiable together as a unit subheading 6207.21.0030, HTSUSA.

Issue:

Whether Styles 9630 and 9631 are classifiable as separates or as pajamas which is a single unit?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6207, HTSUSA, provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles. *The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Cate-*

gories [hereinafter The Guidelines], CIE 13/88, which are occasionally consulted by Customs as guidance in determining the appropriate commercial designation of certain commodities, state the following, in pertinent part:

Pajamas are worn by both sexes and all ages. They consist of an upper part, pullover or coat style, with long, short, or no sleeves and a lower part, short, intermediate, or long-trouser like garments or of any style panties. The lower part sometimes encloses the feet. Pajamas are sleepwear.

In HRL 956202, dated September 29, 1994, Customs was faced with the issue of whether certain garments that were being sold separately, priced separately, and imported together were classifiable separately, priced separately, and imported together were classifiable separately or as pajamas which are considered a single unit. HRL 956202 stated the following:

Based upon their condition at the time of importation, shipments of equal numbers of matching sleepwear (pajama) tops and sleepwear (pajama) bottoms will be viewed by Customs as shipments of composite goods that form a whole which is not normally sold as separate parts and is commercially known as pajamas. Thus, garments in such shipments will be classified as pajamas ***. Please note, that by the term "matching", Customs is making reference not only to design, style and coloring, but also to size. In regard to sizing, provided the bulk of the shipment consists of garments (tops and bottoms) which are matched as to size, a slight variation in sizing between a limited number of tops and bottoms will not preclude classification as pajamas.

When examining the instant case in light of the rationale presented in HRL 956202, it appears that the subject garments are properly classifiable not as separates, but as pajamas. Styles 9630 and 9631 are upper and lower body garments intended for wear during sleep. They are shipped together but packaged separately. The garments will be tagged and sold at retail separately, however, they will be advertised together. Another garment, although not at issue in this instance, was also shipped with Styles 9630 and 9631. This additional garment, Style 9632, is a woven cotton kimono which matched the other two garments and was designed to be worn in conjunction with them. It appears that the garments were of corresponding color and sizing, yet they were priced and sold separately at retail to give the consumer the opportunity to mix and match the component. Despite how the garments are sold once they have been imported, at the time of importation, matching pajama tops and pajama bottoms are shipped together in equal numbers. Therefore, based upon their condition when imported, the garments are looked upon by Customs as composite goods that form a whole which is not normally sold as separate parts and is commercially viewed as pajamas. Thus, Customs is of the opinion that the merchandise at issue is properly classifiable as pajamas under Heading 6207, HTSUSA.

Holding:

Based on the foregoing, Styles 9630 and 9631 are classifiable in subheading 6207.21.0030, HTSUSA, which provides for men's cotton woven pajamas. The applicable rate of duty is 9.4 percent *ad valorem* and the textile restraint category is 351.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs Office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge
Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson
Herbert N. Maletz
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Holding:

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JOHN DURANT,

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Decisions of the United States Court of International Trade

(Slip Op. 95-10)

SUMITRONICS INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 89-03-00148

[Motion for summary judgment granted.]

(Decided January 31, 1995)

George R. Tuttle, III for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice, (*Mark S. Sochaczewsky* and *Bruce N. Stratvert*), *Sheryl A. French*, United States Customs Service, of counsel, for defendant.

OPINION

DiCARLO, Chief Judge: Plaintiff Sumitronics Inc. contests the denial of protests filed pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (1988). Plaintiff moves for summary judgment pursuant to USCIT R. 56(a), requesting that the court sustain plaintiff's protests and direct the United States Customs Service to reliquidate the imported merchandise under plaintiff's proposed classification. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

The imported merchandise consists of electrostatic writing heads used in Benson/Schlumberger 3000 Series 36" and 48" Color Electrostatic Plotters (CES 3000). Plotters—electronic data output devices—are used to reproduce, on paper, graphic images designed on a computer system. The CES 3000 accomplishes this through a toner bed and a matrix of wires which charge the paper with electricity. When the paper passes over the toner bed, the toner adheres to the charged sections, producing an image. The dimensions of the CES 3000 are 43 inches in height, 33 inches in length, and either 51.25 or 64 inches in width depending on the model.

The United States Customs Service classified the writing heads under Item 710.80 as

Drafting machines, compasses, dividers, ruling pens, lettering pens (including fountain-pen type) used by draftsmen, pantographs,

drawing curves, rulers, scribes, straight edges, disc calculators, slide rules, and other instruments, all the foregoing which are drawing, marking-out or mathematical calculating instruments; hand styluses; micrometers, calipers, gauges, balancing machines, and non-optical measuring or checking instruments, apparatus, and machines not specially provided for; and parts of the foregoing articles:

* * * * *

710.80 Other.

Item 710.80, Subpart C, Part 2, Schedule 7, of the Tariff Schedules of the United States (1987) (TSUS). Duty was assessed at 4.9% *ad valorem*. Sumitronics contends the writing heads are properly classifiable under Item 676.54, Subpart G, Part 4, Schedule 6, TSUS (1987), as “[p]arts of automatic data-processing machines and units thereof, other than parts incorporating a cathode ray tube.”

DISCUSSION

At issue is whether the article in which the imported electrostatic writing heads are used constitutes a drawing machine within the scope of Item 710.80, TSUS, or, as plaintiff advocates, a printer for automatic data processing machines under Item 676.30, TSUS. If the machines in which the writing heads are used may not be properly classified under Item 710.80 as drawing machines, it follows the writing heads also may not be classified as parts of drawing machines. *See generally Kores Mfg. Corp. v. United States*, 3 CIT 178, 190, 545 F. Supp. 1303, 1312 (1982). The court finds the writing heads are part of a printer for an automatic data processing machine and properly classifiable under Item 676.54, TSUS.

1. *The CES 3000 is Not a Drawing or Drafting Machine:*

Customs contends that the electrostatic writing heads and their plotters serve the same essential function, purpose, and use as the drawing machines in Item 710.80. Customs argues that as “a machine which creates ‘drawings’ by manipulating ink and paper under the direction of human beings, * * * [the plotter] is an output device which serves the purpose, use, and function of a drawing machine.” (Def.’s Opp’n to Mot. Summ. J. at 4 n.3.) According to Customs, even if the machine constitutes a computer output device, it is merely an advancement of a traditional drawing machine, and therefore is properly classified under Item 710.80, TSUS. *Id.*

These contentions were previously rejected by the court. In *Apple Computer, Inc. v. United States*, 14 CIT 77, *mot. denied*, 14 CIT 719, 749 F. Supp. 1142 (1990), the court found the imported plotters in that case did not “bear an ‘essential resemblance’ to ‘drafting machines,’” nor drawing machines. *Id.* at 85. The court in *Apple Computer* distinguished drafting machines from plotters, noting that traditional drafting machines were used by designers to assist in the creation of drawings by hand, while plotters were exclusively used peripherally with computers.

Id. at 86. Hence, the court interpreted the terms "drafting and drawing machines" to encompass purely hand-held, mechanical instruments. *Id.*

The court finds no issue of material fact in this action. A motion for summary judgment may be granted only when there is no genuine issue as to a material fact; the court may not resolve disputed issues of material fact on its own. *United States v. Peerless Ins. Co.*, 12 CIT 1182, 1189, 703 F. Supp. 955, 961 (1988). Here, the government concedes that, if this court follows *Apple Computer*, then the court could not classify the writing heads as parts of drafting or drafting machines.

It is undisputed that the CES plotters are to be used with a computer and are not designed to assist persons in drawing by hand. (Def.'s Resp. to Pl.'s Stmt. Facts Not in Issue ¶¶ 4, 8; Pl.'s Resp. to Def.'s Stmt. Mat. Facts in Issue ¶ 2.) Although the plotters in *Apple Computer* are distinguishable from the CES plotters in appearance, they are both computer peripherals that translate data received into images upon paper. Neither the *Apple Computer* plotter nor the CES plotter assist in the design or creation of the drawings themselves, rather, they merely assist in the recording and writing of what was created on a data processing machine.

Further, the mere fact that the CES plotters are capable of producing drawings and graphic images does not necessarily make them drawing machines. See *General Methods Corp. v. United States*, 59 CCPA 109, 112, 458 F.2d 521, 523 (1972) (noting that "[t]ariff provisions do not necessarily include everything that falls within their literal meaning.") The court, instead, looks to the principal function of the plotters. As the CES 3000 is designed for use with a computer, rather than to assist designers in the actual drafting or drawing process, it is not properly classified under Item 710.80, TSUS.

Principles of statutory construction support this argument. The doctrine of *noscitur a sociis* provides that associated words explain and limit each other. *Apple Computer*, 14 CIT at 86. The devices listed after "drafting machines" in the provision describing the class for Item 710.80 consist of hand-held instruments—such as compasses or rulers—intricately involved in the actual production of the design. These implements are distinguishable from the CES 3000, which is neither a hand-held instrument nor involved in the actual drawing or drafting.

As the CES plotter is not a mechanical tool designed to assist in the creation of drawings by hand, under *Apple Computer*, its classification as a drafting or drawing instrument is improper. The court again finds "[u]nder these circumstances, *stare decisis* counsels the Court to follow [its] prior decisions. Defendant should address its arguments to our appellate court." *American Lamb Co. v. United States*, 9 CIT 260, 262, 611 F. Supp. 979, 981 (1985), vacated on other grounds, 4 Fed. Cir. (T) 47, 785 F.2d 994 (1986).

2. The CES 3000 is Properly Classified as an "Office Machine":

Plaintiff submits that the proper classification of the CES writing heads is under Subpart G, "Office Machines," specifically Item 676.54,

TSUS, "[p]arts of automatic data-processing machines, and units thereof other than parts incorporating a cathode ray tube."

Customs argues that the CES 3000 is not an "office machine" because it is used for the design phase in production/manufacturing, rather than in a typical office. (Def.'s Supp'l. Mem. at 5-7.) Customs limits its definition of "office," and thus "office work," to encompass only activities which are primarily administrative.

Although the question of whether merchandise fits within the meaning of a tariff term is a question of fact, the common meaning of that tariff term is a question of law. *E.M. Chems. v. United States*, 9 Fed. Cir. (T) 33, 35, 920 F.2d 910, 912 (1990). There is no dispute that the CES 3000 is a computer device for the output of drawings created on an automatic data processing machine, (see Def.'s Resp. to Pl.'s Stmt. of Mat. Facts Not in Issue ¶ 4,) nor any dispute as to how the CES 3000 operates, (Def.'s Stmt. of Add'l Mat. Facts Not in Issue ¶ 6.) The sole issue for the court to decide, therefore, is whether the definition of "office machines" includes computer output devices used to print technical schemata.

When ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405 (1988). Headnote 2(a) of Subpart G defines "office machines" as

machines which are used in offices, shops, factories, workshops, schools, depots, hotels, and elsewhere, for doing work concerning the writing, recording, sorting, filing, mailing of correspondence, records, accounts, forms, etc., or for doing other "office work", and which have a base for fixing or placing them on a table, desk, wall, floor, or similar place * * *.

Headnote 2(a), Subpart G, Part 4, Schedule 6, TSUS (1987).

According to the headnote, an office machine may be used in a wide variety of settings. Thus, the statute cannot be narrowly confined to machines used in an "office."

Further, as a computer output device for printing engineering schemata, maps and geological surveys, lofting drawings for the aerospace industry, and semiconductor designs, (Pl.'s Ex. A, CES 3000 Product Brochure,) the CES 3000 writes computer data—the product of a prior cognitive process—in tangible form. The CES 3000, therefore, does not act as a tool in the creation of the drawing itself, but merely serves to record it on paper. (See Def.'s Resp. to Pl.'s Stmt. of Material Facts Not in Issue ¶ 6.) In this sense, the CES 3000 performs the type of activities which constitute "office work." See *Data Prods. Corp. v. United States*, 4 CIT 234, 238-39, 558 F. Supp. 124, 128 (1982).

Customs argues that the CES 3000 is distinguishable from other output devices, such as the *Apple Computer* plotter, due to its larger size. (Def.'s Supp'l. Mem. at 4-6.) Particularly, Customs argues that, while the output of the *Apple Computer* plotter could serve as "correspondence, records, accounts, forms, * * * or * * * other 'office work,'" the

large-scale output of the CES 3000 reveals its role in production and manufacturing. *Id.* Customs contends that production and manufacturing are outside of the scope of "office work." *Id.*

These arguments are unpersuasive. That the output from the CES 3000 may be larger than that produced on the *Apple Computer* plotter does not mean that the CES 3000's output does not constitute the writing or recording of records, accounts, correspondence, or other work product produced in "offices, shops, factories, workshops, schools, depots, hotels, and elsewhere." Neither the Subpart G headnotes, TSUS, nor the Brussels Nomenclature prescribe a size limit on the product of a data output device. See generally Subpart G Headnotes, Part 4, Schedule 6, TSUS (1987); Item 84.54, Chapter 84, Section XVI, Nomenclature for the Classification of Goods in Customs Tariffs (1968). Indeed, the Headnotes do contemplate large-scale equipment, as their definition of "office machines" includes devices which must be placed on the floor. Headnote 2(a), TSUS.

As the work product of the CES 3000 can conceivably serve as "correspondence, records, accounts, forms, * * * or * * * other 'office work,'" the writing heads are properly classifiable as "office machines."

CONCLUSION

The court finds plaintiff has overcome the presumption of correctness that attaches to the classification by Customs, and that the imported writing heads for the CES 3000 are properly classifiable as "[p]arts of automatic data-processing machines and units thereof, other than parts incorporating a cathode ray tube," under Item 676.56, TSUS.

(Slip Op. 95-11)

SKF USA INC. AND SKF (UK) LTD., PLAINTIFFS v. UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92-07-00515

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") (1) imposition of a difference in merchandising adjustment cap as a test for identifying similar merchandise; and (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price when the rate reported was based upon inventory value, thereby resorting to best information available.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated January 31, 1995)

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel, Thomas J. Trendl and Juliana M. Cofrancesco) for plaintiffs.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Marc E. Montalbine); of counsel: Stephen J. Claeys, Dean A. Pinkert, Stacy J. Ettinger and Thomas H. Fine, Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine and Myron A. Brilliant) for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel, J. Eric Nissley and Joseph A. Perna, V) for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, Judge: Plaintiffs, SKF USA Inc. and SKF (U.K.) Limited ("SKF"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of its administrative review concerning antifriction bearings (other than tapered roller bearings) ("AFB") and parts thereof from the United Kingdom. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (June 24, 1992).

Specifically, plaintiffs contest Commerce's (1) imposition of a difference in merchandising adjustment cap ("difmer") as a test for identifying similar merchandise; and (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price ("USP") when the rate reported was based upon inventory value, thereby resorting to best information available ("BIA").

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (May 15, 1989). On June 28, 1991, July 19, 1991 and August 14, 1991, Commerce initiated administrative reviews with respect to various manufacturers and exporters from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, including SKF (U.K.) Limited, for the period May 1, 1990 through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews*, 56 Fed. Reg. 29,618 (June 28, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 33,251 (July 19, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 40,305 (August 14, 1991).

On March 31, 1992, Commerce published the preliminary results of its second administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 57 Fed. Reg. 10,859 (March 31, 1992).

On June 24, 1992, Commerce published one joint final determination for the nine administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (June 24, 1992).

On July 24, 1992, SKF filed its summons in this case, challenging the final results with respect to the United Kingdom.

DISCUSSION

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed Cir. 1990).

1. Difference in Merchandise Adjustment Cap:

SKF challenges Commerce's use of a 20% difference in merchandise adjustment cap, in addition to a family model match methodology which takes eight physical criteria into account, to determine what constitutes similar merchandise. According to SKF, Commerce's institution of a difmer cap, after a hearing which followed the second review preliminary results, is a last-minute change which undermines the ability of parties to predict Commerce's actions and to alter their pricing behavior. SKF also alleges that Commerce failed to sufficiently explain its change in methodology. In sum, SKF challenges Commerce's imposition of the difmer cap in the second review where there was no difmer cap in the first review. *Brief in Support of plaintiffs' Motion for Judgment Upon the Agency Record ("SKF's Brief")* at 12-22.

Commerce argues that the application of the difmer cap was a proper exercise of its discretion and was meant to ensure that a reasonable comparison of merchandise would be made. Commerce asserts that it has broad discretion in its selection of what constitutes "similar" merchandise and may refine its methodology in succeeding reviews. Since the two tests employed in the final determination of the second review are complimentary, the cap minimizes the effects of distortions where there is a difference in the variable costs of production and there are no cir-

cumstances in this case to warrant disregarding the cap, Commerce claims its decision was in accordance with law. Commerce states that as this is only the second review, SKF cannot claim a significant reliance on the fact that Commerce had not applied the 20% difmer cap in the original investigation or in the first administrative review. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record* ("Defendant's Brief") at 5-16.

Defendant-intervenor The Torrington Company ("Torrington") agrees with SKF that the difmer cap should not be applied and additionally, contests the use of the family model match methodology. Torrington alleges that Commerce's definition of "similar merchandise" was impermissibly narrow and limiting. *Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Judgment on the Agency Record* ("Torrington's Brief") at 4-12.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") opposes SKF on grounds that SKF failed to show that the use of the difmer cap had any effect on the margin calculations. *Opposition of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record* ("Federal-Mogul's Brief") at 8-9.

When identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select "similar" comparison merchandise based upon the physical characteristics of the merchandise being compared. 19 U.S.C. § 1677(16) (1988).¹ Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984).

An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, there is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of foreign market value ("FMV") calculations. 19 U.S.C. § 1677(16); *see Timken Co. v. United States* ("Timken I"), 10 CIT 86, 96, 630 F. Supp. 1327, 1336 (1986). Undoubtedly, Commerce's fundamental objective in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" sold in the foreign market. *Timken I*, 10 CIT at 95, 630 F. Supp. at 1336.

¹ 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purpose of part II of this subtitle can be satisfactorily made:

- (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
- (B) Merchandise—
 - (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
 - (ii) like that merchandise in component material or materials and in the purposes for which used, and
 - (iii) approximately equal in commercial value to that merchandise.
- (C) Merchandise—
 - (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
 - (ii) like that merchandise in the purposes for which used, and
 - (iii) which the administering authority determines may reasonably be compared with that merchandise.

Thus, contrary to the assertion of Torrington, the statute does not require Commerce to use a methodology that identifies the greatest number of matches of similar merchandise.

Further, when comparing merchandise which is similar, 19 U.S.C. § 1677b(a)(4)(C) (1988) directs Commerce to adjust foreign market value for differences in merchandise being compared.

In this administrative review, Commerce determined what constituted "similar merchandise" for purposes of comparing U.S. and foreign market sales by grouping bearings into families based upon eight defined physical characteristics. Commerce also employed a 20% difference cap so that bearings having a greater than 20% difference in their variable costs of manufacture would not be treated as "similar." *Final Results*, 57 Fed. Reg. at 28,364-67.

This Court finds that Commerce's action was within the broad discretion it is granted to determine "similar merchandise". *See SKF USA Inc. and SKF GmbH v. United States* ("SKF USA Inc. and SKF GmbH"), 19 CIT ___, ___, Slip Op. 95-8 at 5-9 (January 25, 1995); *see also SKF USA Inc. and SKF Industrie, S.p.A. v. United States* ("SKF USA Inc."), 19 CIT ___, ___, Slip Op. 95-6 at 5-9 (January 20, 1995). Its action on this issue was in accordance with law and supported by substantial evidence and is hereby affirmed.

2. U.S. Inland Insurance Expense Adjustment:

SKF contests Commerce's adjustment of USP for U.S. inland insurance expense. First, SKF claims that the expense was insignificant and should therefore have been disregarded, pursuant to 19 C.F.R. § 353.59(a) (1992). SKF asserts its U.S. inland insurance rate to be well within the guideline provided in 19 C.F.R. § 353.59(a). Second, SKF asserts Commerce inappropriately applied BIA. SKF states it omitted the requested information from the computer tape because it considered it insignificant, but reported the information in its Section B narrative response. SKF states Commerce unreasonably resorted to BIA because Commerce accepted SKF's reporting both in the first review and in the preliminary results of the second review and did not request SKF to supplement or correct its reporting. Finally, SKF alternatively argues that if the adjustment was warranted, Commerce used the incorrect information by applying the insurance rate to unit price even though it had been reported as a percentage of inventory value. *SKF's Brief* at 22-26.

SKF requests a remand with instructions to Commerce to either disregard SKF's U.S. inland insurance or apply its rate to the reported base of inventory value. *Id.*

Commerce's position is that the adjustment was reasonable and that its use and choice of BIA were reasonable as well, since SKF failed to provide the information requested. Commerce asserts it alone has the discretionary authority to disregard insignificant adjustments pursuant to 19 C.F.R. § 353.59 (a) and, as there was clear evidence that inland insurance expenses existed, Commerce properly adjusted for them. Com-

merce also claims its use of BIA was appropriate since it requested that SKF report the information under appropriately labeled variables. Although SKF did report the amount of inland insurance expense in its narrative response, it specifically refused to include the information in its computer tapes. Commerce asserts such non-compliance justifies the use of BIA and its choice of BIA (the U.S. inland insurance rate reported in SKF's narrative submission applied to unit prices less billing adjustments) was reasonable. *Defendant's Brief* at 16-20.

Defendant-intervenors Torrington and Federal-Mogul echo the arguments made by Commerce, pointing out that SKF had five months in which to correct the submitted information. *Torrington's Brief* at 12-17; *Federal-Mogul's Brief* at 4-8.

19 U.S.C. § 1677f-1(a) (1988) provides:

For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority *may*—

* * * * *

(2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

(Emphasis added.)

19 C.F.R. § 353.59(a) states:

The Secretary *may* disregard adjustments to foreign market value which are insignificant. *Ordinarily*, the Secretary will disregard individual adjustments having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the foreign market value.

(Emphasis added.)

Thus, the statute provides not only that Commerce is the appropriate authority to determine whether an adjustment is insignificant, but also that it is Commerce that has the discretion to determine whether or not to disregard an insignificant adjustment. This Court therefore finds that it was properly within Commerce's discretion to determine whether the adjustment at issue was insignificant and whether or not to disregard it. *SKF USA Inc. and SKF GmbH*, 19 CIT at ___, Slip Op. 95-8 at 11; *SKF USA Inc.*, 19 CIT at ___, Slip Op. 95-6 at 11.

SKF assigned "zero" to its U.S. inland insurance variable on its computer tape. As a result, Commerce determined that:

* * * SKF understated the amounts of U.S. inland insurance on its computer tape. We have used the factor provided by SKF [in the narrative portion of its questionnaire response] to calculate U.S. inland freight and deducted this amount from U.S. price for the final results.

Final Results, 57 Fed. Reg. at 28,398.

The antidumping statute provides that, whenever a party refuses or is unable to provide information requested in a timely manner and in the form required, Commerce shall use BIA. 19 U.S.C. § 1677e(c) (1988). In

this case, however, the record reveals that Commerce had not requested this information or, more accurately, instructed SKF not to report it on its computer tapes having reported it in its narrative response. Commerce's questionnaire specifically instructed:

* * * omit any expense item for which the values for all sales are derived by applying the same factor or percentage to the value of another item. For example, if the per-unit direct advertising expense amount is derived for all ESP sales by multiplying the unit price by three percent, do not include the direct advertising variable in your computer listing. Provide the factor or percentage, and the basis to which it should be applied, in your narrative response.

Public Document No. 26, frame 1721, p. 15. U.S. inland insurance expense was exactly such an expense item, reported as a percentage. SKF complied with the instructions, providing in its narrative response the applicable percentage and the item against which the percentage should be multiplied. It is uncontested that SKF provided this information in its narrative response. Therefore, this Court finds that Commerce should not have resorted to BIA. *See SKF USA Inc. and SKF GmbH*, 19 CIT at ___, Slip Op. 95-8 at 12; *see SKF USA Inc.*, 19 CIT at ___, Slip Op. 95-6 at 12.

Having determined that it was not for SKF to decide whether its expense was insignificant or should be disregarded and that Commerce should nonetheless not apply BIA, this Court must determine what information should be applied for SKF's U.S. inland insurance expense. Although SKF reported that the correct base to which SKF's insurance rate should be applied was inventory value, Commerce applied the rate to unit price, calling it BIA. Commerce provided no explanation for choosing price over value or for rejecting the information provided by SKF. Upon consideration of the record, this Court can find no reason that Commerce should have chosen a price base in place of the cost base provided. Therefore, this Court finds that Commerce's application of the U.S. inland insurance rate reported in SKF's narrative submission to the unit price less billing adjustments was not supported by substantial evidence. *See SKF USA Inc. and SKF GmbH*, 19 CIT at ___, Slip Op. 95-8 at 13; *see SKF USA Inc.*, 19 CIT at ___, Slip Op. 95-6 at 13. This issue is remanded for Commerce to apply SKF's U.S. inland insurance rate to inventory value.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 95-12)

RHP BEARINGS, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92-07-00533

Plaintiffs challenge certain aspects of the final determination of the United States Department of Commerce, International Trade Administration ("Commerce"), in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (1992). Plaintiffs allege that Commerce (1) erred in refusing to correct a clerical error pertaining to the description of model RJ244; and (2) erroneously treated plaintiffs' technical service expenses in the U.S. market as direct expenses. This matter is before the Court on plaintiffs' motion for judgment upon the agency record pursuant to Rule 56.2 of the Rules of this Court.

Held: Plaintiffs' motion is denied. Commerce properly declined to correct the alleged error pertaining to model RJ244 as the subject error was not obvious from the administrative record and plaintiffs' new information was not obviously correct. Commerce also properly treated plaintiffs' unsegregated technical service expenses in the U.S. market as direct expenses after plaintiffs failed to provide Commerce with requested information separating direct and indirect expenses. There is a preference for actual, instead of allocated, expense information and Commerce's action was a reasonable means of encouraging that actual information is submitted in the future. This case is dismissed.

[Plaintiffs' motion is denied; case dismissed.]

(Dated January 31, 1995)

Covington & Burling (Harvey M. Applebaum, David R. Grace; Thomas A. Robertson, Michael P. Socarras and Mark F. Kightlinger) for plaintiffs, RHP Bearings, et al.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Marc E. Montalbine); of counsel: Dean A. Pinkert, Stacy J. Ettinger and Stephen J. Claeys, Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine, Robert A. Weaver and James R. Cannon, Jr.) for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley and Joseph A. Perna, V) for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, Judge: The plaintiffs in this case are RHP Bearings, RHP Bearings Inc. and United Precision Industries, Ltd. (collectively "RHP"). RHP raises two challenges to the final determination of the United States Department of Commerce, International Trade Administration ("Commerce"), in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (1992).

This action is before the Court on RHP's motion for judgment upon the agency record pursuant to Rule 56.2 of the Rules of this Court.

BACKGROUND

On May 15, 1989, Commerce published notice of the antidumping duty order which underlies this action. *Antidumping Duty Orders and*

Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom, 54 Fed. Reg. 20,910 (1989).

On June 28, 1991, Commerce initiated an administrative review of this order with respect to various manufacturers and exporters for the period May 1, 1990 through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews ("Initiation")*, 56 Fed. Reg. 29,618 (1991).

On March 31, 1992, Commerce published notice of the preliminary determination in this second administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews ("Preliminary Results")*, 57 Fed. Reg. 10,878 (1992).

On June 24, 1992, Commerce published notice of the consolidated final determination in this review. *Final Results*, 57 Fed. Reg. at 28,360. Amendments to the Final Results were published in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 32,969 (1992) and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 59,080 (1992).

Against this background, RHP now moves pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record alleging that Commerce (1) erred in refusing to correct a clerical error pertaining to the description of model RJ244; and (2) erroneously treated RHP's technical service expenses in the U.S. market as direct expenses. *Memorandum in Support of Plaintiffs' Motion for Judgment Upon the Agency Record ("Plaintiffs' Brief")* at 1-12.

DISCUSSION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

This Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*,

12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Clerical Data Input Error:*

RHP informed Commerce, after publication of the Preliminary Results, that it had inadvertently misreported that model "RJ244" contained twenty rolling elements. RHP explained that information already existing on the record on RHP's computer tape accurately showed that model RJ244 contained no rolling elements. *Plaintiffs' Brief* at 6.

RHP challenges Commerce's refusal to correct this alleged error arguing that the misdescription of RJ244 materially affected the accuracy of the Final Results. *Id.* at 5. Specifically, RHP contends that the error resulted in the calculation of an inflated constructed value used as the basis of foreign market value ("FMV"). *Final Results*, 57 Fed. Reg. at 28,426. RHP insists that this error be corrected in the interest of fairness and accuracy. *Plaintiffs' Brief* at 5-7.

Commerce, however, maintains that it acted within its discretion in rejecting RHP's new information. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Brief")* at 7-10.

Regarding RHP's requested correction, Commerce's Final Results stated:

[T]here is conflicting information on the record and we cannot conclude that the initial response contains an obvious error * * *. Therefore, we have not made this correction. This information is also untimely, having been submitted after verifications were completed and publication of our preliminary results, and was not requested by the Department * * *.

[W]e cannot determine from the information that was already on the record that the newly submitted data are accurate or that the originally submitted data were not accurate.

Final Results, 57 Fed. Reg. at 28,426. Before the Court, Commerce argues that information which RHP submitted to demonstrate the alleged error is ineffectual as the new information does not specifically indicate that model RJ244 has zero rolling elements. *Defendant's Brief* at 9. Furthermore, Commerce asserts that RHP had adequate time within which to check the accuracy of its July 26, 1991 submission prior to the March 31, 1992 publication of the Preliminary Results. *Id.* at 8.

In rebuttal, RHP states, "The Government does not try to explain how the RJ244 could be an inner ring (*i.e.*, an item that does not contain rolling elements), have 'zero' rows of rolling elements, and yet still contain such rolling elements." *Reply Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record* at 3. RHP also points out to the Court that, in the 1988-90 administrative review, Commerce accepted that model RJ244 contained zero rolling elements. *Id.*

Commerce is not required to correct a respondent's errors when the respondent has reported erroneous data and has failed to timely correct

it. *NSK Ltd. v. United States*, 17 CIT ___, ___, 825 F. Supp. 315, 318 (1993). See *NSK Ltd. v. United States*, 16 CIT 745, 749, 798 F. Supp. 721, 725 (1992), aff'd, 996 F.2d 1236 (Fed. Cir. 1993). See also *Sugiyama Chain Co. v. United States*, 16 CIT 526, 533, 797 F. Supp. 989, 995 (1992). A respondent in an antidumping proceeding bears the burden of preparing and providing Commerce with an accurate submission within the prescribed statutory deadline. See *NSK Ltd.*, 17 CIT at ___, 825 F. Supp. at 319; see also *Chinsung Indus. Co. v. United States*, 13 CIT 103, 106, 705 F. Supp. 598, 601 (1989).

In this case, RHP had ample time, prior to issuance of the Preliminary Results, to ascertain whether the data it had previously submitted concerning RJ244 was accurate. It failed to do so and attempted to provide Commerce with new factual information¹ by correspondence dated April 14, 1992. This communication occurred after publication of the Preliminary Results and over 180 days after publication of the notice of initiation of this administrative review. Compare United Kingdom AR (Pub.) Doc. 243 at 106 with *Initiation*, 56 Fed. Reg. at 29,618, and *Preliminary Results*, 57 Fed. Reg. at 10,878. Therefore, RHP's unsolicited information was untimely. 19 C.F.R. § 353.31(a). This court has stated that it is "imperative the requested information be submitted within a period that allows Commerce sufficient time for adequate analysis and comment while still meeting statutory deadlines." *Ansaldi Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986).

This court has previously upheld Commerce's rejection of factual information which is untimely submitted. See, e.g., *Mantex, Inc. v. United States*, 17 CIT ___, ___, 841 F. Supp. 1290, 1310 (1993); *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 25, 704 F. Supp. 1114, 1124 (1989), aff'd, 901 F.2d 1089, cert. denied, 498 U.S. 848 (1990); *Seattle Marine Fishing Supply Co. v. United States*, 12 CIT 60, 71, 679 F. Supp. 1119, 1128 (1988). However, where corrected information has been untimely filed and rejected by Commerce, the court may remand the case to Commerce for adjustment of the calculations where the "error was so egregious and so obvious that the failure to correct it was an abuse of discretion and undermined the interests of justice." *Tehnoimportexport v. United States*, 15 CIT 250, 258-59, 766 F. Supp. 1169, 1178 (1991). An error, although untimely filed, is eligible for correction if the error is obvious from an examination of the administra-

1 § 353.31 Submission of factual information.

(a) *Time limits in general.* (1) Except as provided in paragraphs (a) (2) and (b) of this section, submissions of factual information for the Secretary's consideration shall be submitted not later than:

* * * * *

(ii) For the Secretary's final results of an administrative review under § 353.22(c) or (f), the earlier of the date of publication of notice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review; or

* * * * *

(2) Any interested party * * * may submit factual information to rebut, clarify, or correct factual information submitted by an interested party * * * at any time prior to the deadline provided in this section for submission of such factual information or, if later, 10 days after the date such factual information is served on the interested party * * *.

(3) The Secretary will not consider in the final determination or the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit.

19 C.F.R. § 353.31(a) (1991).

tive record which is before Commerce at the time of the preliminary results and the newly submitted information is obviously correct. *NSK Ltd.*, 16 CIT at 749, 798 F. Supp. at 725. Therefore, the question before the Court is whether Commerce's determination that the original information submitted by RHP was not obviously in error and that its newly submitted information was not obviously correct was supported by substantial evidence.

Contrary to Commerce's contention that RHP's post-Preliminary Results explanatory information was incomplete or ambiguous, the record reveals that RHP's narrative explanation specifically states that model RJ244 contains "no rolling elements." United Kingdom AR (Pub.) Doc. 243 at 114. The Court agrees with RHP that an inner ring contains no rolling elements. Rings supply smooth, hard, accurate surfaces for rolling elements to roll on. However, the record does not conclusively indicate that model RJ244 is a mere inner ring.

Commerce's examination of the administrative record, at the time that RHP pointed out the alleged error, revealed conflicting evidence pertaining to model RJ244. Commerce stated, "[W]ith respect to the number of rolling elements for the inner ring, there is conflicting information * * *. Cost data for the part number in question shows costs for an outer bearing, an inner ring, and rolling elements, indicating the product is a bearing, not just an inner ring." *Final Results*, 57 Fed. Reg. at 28,426. Therefore, record evidence in existence at the time that RHP brought the alleged error to Commerce's attention precluded the conclusion by Commerce that there was obvious error on the record and that RHP's newly submitted explanatory information was obviously correct. Hence, the Court finds that Commerce's decision that RHP's originally submitted information was correct, and its reliance on that information to calculate RHP's margin, was supported by substantial evidence on the record and was in accordance with law.

2. Technical Service Expenses:

RHP incurred technical service expenses ("TSEs") generated by its team of engineers in the United Kingdom assisting RHP's customers in the U.K. and abroad with bearing problems. RHP reported its TSEs for the United States and United Kingdom markets as indirect selling expenses. Commerce, however, resorted to best information available ("BIA") and treated RHP's TSEs as direct expenses for United States price ("USP") purposes and as indirect expenses for FMV purposes.

RHP objects to Commerce's classification of its United States TSEs as direct expenses. RHP contends that TSEs are properly considered direct selling expenses only when they are demonstrably directly related to the specific sales under review. RHP denies that any direct relationship exists between its TSEs and the sales under review as it does not maintain any records which allow it to tie its TSEs directly to particular products, sales, customers or markets. *Plaintiffs' Brief* at 7-8. RHP also asserts that if some of its TSEs were variable, they nevertheless were not tied directly to sales. *Id.* at 8.

RHP further argues that Commerce's resort to adverse BIA was improper. According to RHP, Commerce's initial questionnaire sought only a description of RHP's TSEs and the justification for any direct expense claim; it did not request a justification for indirect expenses. RHP also contends that Commerce's request for supplemental information only asked RHP to separate direct and indirect expenses; it did not request a breakdown of fixed and variable costs. *Id.* at 9–10. RHP notes that its records would not have allowed it to segregate fixed and variable costs in any event. *Id.* at 8–9. RHP states that it explained to Commerce that "it had no direct expenses to segregate." *Id.* at 11. Moreover, RHP maintains that Commerce treated RHP's United States and home market TSEs as indirect expenses in the initial investigation and the first administrative review. *Id.* at 8–9.

In the Final Results, Commerce addressed RHP's technical service expenses, stating:

In the questionnaire, the Department requested that respondents separate technical service expenses into direct and indirect portions. Since RHP could not distinguish between the direct and indirect portions of this expense in either market, we used the best information otherwise available and considered the entire U.S. technical service expense as direct and the entire home market amount as an indirect expense.

Final Results, 57 Fed. Reg. at 28,408. Commerce explains that, because of the incentive that exists to report selling expenses as indirect in the United States and direct in the home market because maximizing USP and minimizing FMV decreases dumping margins, it requested that RHP separate direct and indirect expenses. *Defendant's Brief* at 12. Commerce states, "[T]he fact that RHP chooses to keep its financial records in such a way that these expenses cannot be tied to specific sales does not relieve it of its responsibility to provide Commerce with actual expense information." *Id.* at 13–14. Commerce maintains that, because RHP allocated its TSEs over total global sales revenue instead of submitting actual technical expense information, Commerce is allowed to make an adverse inference and to treat RHP's expenses in a manner which will encourage RHP to submit actual expense information in the future. *Id.* at 14.

Defendant-intervenors, The Torrington Company and Federal-Mogul Corporation, essentially support Commerce's treatment of RHP's TSEs pertaining to U.S. sales. *Response of Defendant-Intervenor The Torrington Company to Plaintiffs' Motion for Judgment Upon the Agency Record* at 1–15; *Response of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record* at 1–9.

RHP incurred technical service expenses which it allocated over total global sales. It is uncontested that RHP's original TSE information did not tie TSEs to specific products, sales, customers, or markets. Moreover, RHP concedes that it did not segregate its direct and indirect

expenses in response to Commerce's request for supplemental information.

The Court has recognized the preference for actual expense information as opposed to allocated expense data, noting:

The statute and the ITA have a preference for respondents to provide actual expense information as opposed to allocated expense information. As a result, the ITA generally gives respondents an incentive to provide the ITA with actual expense information. The ITA does this by classifying actual expense information in a way which gives greater benefit to the respondent and classifying allocated information in a way which gives a respondent less benefit. *This can lead to differing treatment of the same kind of expenses in the calculation of USP and FMV.*

A respondent benefits by having home market expenses characterized as direct because generally FMV will be adjusted only for direct expenses. If the respondent fails to meet the standard for receiving a direct adjustment to price for its home market expenses, the expense will be treated as an indirect expense because this treatment is adverse to the respondent ***. *Allocated expenses in the U.S. market are treated as direct expenses because direct expenses will be deducted from all USP transactions which will, therefore, reduce USP and potentially increase dumping margins. If these expenses were treated as indirect expenses, they would only be deducted from USP in regard to ESP transactions and will, therefore, reduce USP and potentially increase the dumping margin only for ESP transactions. Therefore, treatment of these expenses as indirect expenses would destroy any incentive a respondent has to provide the ITA with actual expense information.*

Torrington Co. v. United States, 17 CIT ___, ___, 832 F. Supp. 365, 376 (1993), modified, in part, remanded, 17 CIT ___, ___, 850 F. Supp. 1, 5-6 (1993) (citations omitted) (emphasis added). The court has affirmed this method of providing an incentive for respondents to provide actual expense information. See *Torrington Co.*, 17 CIT at ___, 832 F. Supp. at 378; *Koyo Seiko Co. v. United States*, 16 CIT 539, 542-43, 796 F. Supp. 1526, 1530 (1992); *Timken Co. v. United States*, 11 CIT 786, 804, 673 F. Supp. 495, 512-13 (1987).

Accordingly, the Court affirms Commerce's treatment of RHP's technical service expenses in the U.S. market.

CONCLUSION

RHP's motion for judgment upon the agency record is denied. The Court finds that Commerce's refusal to correct the alleged error pertaining to model RJ244 and its treatment of RHP's U.S. market technical service expenses are supported by substantial evidence on the record and are in accordance with law. Evidence on the administrative record in existence at the time that RHP highlighted the alleged error relating to model RJ244 did not show obvious error and RHP's newly submitted information was not obviously correct. Therefore, the Court affirms Commerce's decision to utilize RHP's originally submitted information in its calculation of RHP's margin. In addition, RHP allocated technical

service expenses over total global sales. It failed to tie the TSEs to specific products, sales, customers or markets and failed to provide Commerce with requested information segregating direct and indirect expenses. Therefore, Commerce properly made an adverse inference and treated RHP's U.S. market technical service expenses as direct expenses in order to encourage RHP to submit actual information in the future. Accordingly, the Court affirms Commerce's treatment of RHP's U.S. technical service expenses. This case is dismissed.

(Slip Op. 95-13)

SKF USA INC. AND SKF SVERIGE AB, PLAINTIFFS v. UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92-97-00517

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") (1) imposition of a difference in merchandising adjustment cap as a test for identifying similar merchandise; and (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price when the rate reported was based upon inventory value, thereby resorting to best information available.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.

(Dated January 31, 1995)

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel and Juliana M. Cofrancesco) for plaintiffs.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Marc E. Montalbine); of counsel: Stephen J. Claeys, Dean A. Pinkert and Stacy J. Ettinger, Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant. Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine and Myron A. Brilliant) for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel, J. Eric Nissley and Joseph A. Perna, V) for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, Judge: Plaintiffs, SKF USA Inc. and SKF Sverige AB ("SKF"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of its administrative review concerning antifriction bearings (other than tapered roller bearings) ("AFB") and parts thereof from Sweden. *Antifriction Bearings (Other*

Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results"), 57 Fed. Reg. 28,360 (June 24, 1992).

Specifically, plaintiffs contest Commerce's (1) imposition of a difference in merchandising adjustment cap ("difmer") as a test for identifying similar merchandise; and (2) disregarding plaintiffs' claim that U.S. inland insurance expense was insignificant and application of the reported insurance rate to U.S. price ("USP") when the rate reported was based upon inventory value, thereby resorting to best information available ("BIA").

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (May 15, 1989). On June 28, 1991, July 19, 1991 and August 14, 1991, Commerce initiated administrative reviews with respect to various manufacturers and exporters from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, including SKF Sverige AB, for the period May 1, 1990 through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews*, 56 Fed. Reg. 29,618 (June 28, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 33,251 (July 19, 1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 40,305 (August 14, 1991).

On March 31, 1992, Commerce published the preliminary results of its second administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Review*, 57 Fed. Reg. 10,859 (March 31, 1992).

On June 24, 1992, Commerce published one joint final determination for the nine administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (June 24, 1992).

On July 24, 1992, SKF filed its summons in this case, challenging the final results with respect to Sweden.

DISCUSSION

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.

§ 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed Cir. 1990).

1. Difference in Merchandise Adjustment Cap:

SKF challenges Commerce's use of a 20% difference in merchandise adjustment cap, in addition to a family model match methodology which takes eight physical criteria into account, to determine what constitutes similar merchandise. According to SKF, Commerce's institution of a difmer cap, after a hearing which followed the second review preliminary results, is a last-minute change which undermines the ability of parties to predict Commerce's actions and to alter their pricing behavior. SKF also alleges that Commerce failed to sufficiently explain its change in methodology. In sum, SKF challenges Commerce's imposition of the difmer cap in the second review where there was no difmer cap in the first review. *Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record* ("SKF's Brief") at 12-22.

Commerce argues that the application of the difmer cap was a proper exercise of its discretion and was meant to ensure that a reasonable comparison of merchandise would be made. Commerce asserts that it has broad discretion in its selection of what constitutes "similar" merchandise and may refine its methodology in succeeding reviews. Since the two tests employed in the final determination of the second review are complimentary, the cap minimizes the effects of distortions where there is a difference in the variable costs of production and there are no circumstances in this case to warrant disregarding the cap, Commerce claims its decision was in accordance with law. Commerce states that as this is only the second review, SKF cannot claim a significant reliance on the fact that Commerce had not applied the 20% difmer cap in the original investigation or in the first administrative review. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record* ("Defendant's Brief") at 5-16.

Defendant-intervenor The Torrington Company ("Torrington") agrees with SKF that the difmer cap should not be applied and additionally, contests the use of the family model match methodology. Torrington alleges that Commerce's definition of "similar merchandise" was impermissibly narrow and limiting. *Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Judgment on the Agency Record* ("Torrington's Brief") at 4-12.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") opposes SKF on grounds that Commerce is required to consider commercial value in determining similar merchandise. *Opposition of*

Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record ("Federal-Mogul's Brief") at 8-12.

When identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select "similar" comparison merchandise based upon the physical characteristics of the merchandise being compared. 19 U.S.C. § 1677(16) (1988).¹ Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984).

An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, there is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of foreign market value ("FMV") calculations. 19 U.S.C. § 1677(16); *see Timken Co. v. United States ("Timken I")*, 10 CIT 86, 96, 630 F. Supp. 1327, 1336 (1986). Undoubtedly, Commerce's fundamental objective in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" sold in the foreign market. *Timken I*, 10 CIT at 95, 630 F. Supp. at 1336.

Thus, contrary to the assertion of Torrington, the statute does not require Commerce to use a methodology that identifies the greatest number of matches of similar merchandise.

Further, when comparing merchandise which is similar, 19 U.S.C. § 1677b(a)(4)(C) (1988) directs Commerce to adjust foreign market value for differences in merchandise being compared.

In this administrative review, Commerce determined what constituted "similar merchandise" for purposes of comparing U.S. and foreign market sales by grouping bearings into families based upon eight defined physical characteristics. Commerce also employed a 20% difference cap so that bearings having a greater than 20% difference in their variable costs of manufacture would not be treated as "similar." *Final Results*, 57 Fed. Reg. at 28,364-67.

This Court finds that Commerce's action was within the broad discretion it is granted to determine "similar merchandise". *See SKF USA Inc. and SKF GmbH v. United States ("SKF USA Inc. and SKF*

¹ 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purpose of part II of this subtitle can be satisfactorily made:

- (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
- (B) Merchandise—
 - (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
 - (ii) like that merchandise in component material or materials and in the purposes for which used, and
 - (iii) approximately equal in commercial value to that merchandise.
- (C) Merchandise—
 - (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
 - (ii) like that merchandise in the purposes for which used, and
 - (iii) which the administering authority determines may reasonably be compared with that merchandise.

GmbH"), 19 CIT ___, ___, Slip Op. 95-5 at 5-9 (January 25, 1995); *see SKF USA Inc. and SKF Industrie, S.p.A. v. United States* ("SKF USA Inc."), 19 CIT ___, ___, Slip Op. 95-6 at 5-9 (January 20, 1995). Its action on this issue was in accordance with law and supported by substantial evidence and is hereby affirmed.

2. U.S. Inland Insurance Expense Adjustment:

SKF contests Commerce's adjustment of USP for U.S. inland insurance expense. First, SKF claims that the expense was insignificant and should therefore have been disregarded, pursuant to 19 C.F.R. § 353.59(a) (1992). SKF asserts its U.S. inland insurance rate to be well within the guideline provided in 19 C.F.R. § 353.59(a). Second, SKF asserts Commerce inappropriately applied BIA. SKF states it omitted the requested information from the computer tape because it considered it insignificant, but reported the information in its Section B narrative response. SKF states Commerce unreasonably resorted to BIA because Commerce accepted SKF's reporting both in the first review and in the preliminary results of the second review and did not request SKF to supplement or correct its reporting. Finally, SKF alternatively argues that if the adjustment was warranted, Commerce used the incorrect information by applying the insurance rate to unit price even though it had been reported as a percentage of inventory value. SKF asserts Commerce further erred by failing to adjust the unit price for billing adjustments. *SKF's Brief* at 22-26.

SKF requests a remand with instructions to Commerce to either disregard SKF's U.S. inland insurance or apply its rate to the reported base of inventory value. *Id.*

Commerce's position is that the adjustment was reasonable and that its use and choice of BIA were reasonable as well, since SKF failed to provide the information requested. Commerce asserts it alone has the discretionary authority to disregard insignificant adjustments pursuant to 19 C.F.R. § 353.59(a) and, as there was clear evidence that inland insurance expenses existed, Commerce properly adjusted for them. Commerce also claims its use of BIA was appropriate since it requested that SKF report the information under appropriately labeled variables. Although SKF did report the amount of inland insurance expense in its narrative response, it specifically refused to include the information in its computer tapes. Commerce asserts such non-compliance justifies the use of BIA and its choice of BIA (the U.S. inland insurance rate reported in SKF's narrative submission applied to unit prices) was reasonable. *Defendant's Brief* at 16-20.

Defendant-intervenors Torrington and Federal-Mogul echo the arguments made by Commerce, pointing out that SKF had five months in which to correct the submitted information. *Torrington's Brief* at 12-17; *Federal-Mogul's Brief* at 4-8.

19 U.S.C. § 1677f-1(a) (1988) provides:

For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for

purposes of carrying out annual reviews under section 1675 of this title, the administering authority *may*—

* * * * *

(2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

(Emphasis added.)

19 C.F.R. § 353.59 (a) states:

The Secretary *may* disregard adjustments to foreign market value which are insignificant. *Ordinarily*, the Secretary will disregard individual adjustments having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the foreign market value.

(Emphasis added.)

Thus, the statute provides not only that Commerce is the appropriate authority to determine whether an adjustment is insignificant, but also that it is Commerce that has the discretion to determine whether or not to disregard an insignificant adjustment. This Court therefore finds that it was properly within Commerce's discretion to determine whether the adjustment at issue was insignificant and whether or not to disregard it. *SKF USA Inc. and SKF GmbH*, 19 CIT at ___, Slip Op. 95-8 at 11; *SKF USA Inc.*, 19 CIT at ___, Slip Op. 95-6 at 11.

SKF assigned "zero" to its U.S. inland insurance variable on its computer tape. As a result, Commerce determined that:

* * * SKF understated the amounts of U.S. inland insurance on its computer tape. We have used the factor provided by SKF [in the narrative portion of its questionnaire response] to calculate U.S. inland freight and deducted this amount from U.S. price for the final results.

Final Results, 57 Fed. Reg. at 28,398.

The antidumping statute provides that, whenever a party refuses or is unable to provide information requested in a timely manner and in the form required, Commerce shall use BIA. 19 U.S.C. § 1677e(c) (1988). In this case, however, the record reveals that Commerce had not requested this information or, more accurately, instructed SKF not to report it on its computer tapes having reported it in its narrative response. Commerce's questionnaire specifically instructed:

* * * omit any expense item for which the values for all sales are derived by applying the same factor or percentage to the value of another item. For example, if the per-unit direct advertising expense amount is derived for all ESP sales by multiplying the unit price by three percent, do not include the direct advertising variable in your computer listing. Provide the factor or percentage, and the basis to which it should be applied, in your narrative response.

Public Document No. 26, frame 1721, p. 15. U.S. inland insurance expense was exactly such an expense item, reported as a percentage. SKF complied with the instructions, providing in its narrative response the applicable percentage and the item against which the percentage

should be multiplied. It is uncontested that SKF provided this information in its narrative response. Therefore, this Court finds that Commerce should not have resorted to BIA. *See SKF USA Inc. and SKF GmbH*, 19 CIT at ___, Slip Op. 95-8 at 12; *see SKF USA Inc.*, 19 CIT at ___, Slip Op. 95-6 at 12.

Having determined that it was not for SKF to decide whether its expense was insignificant or should be disregarded and that Commerce should nonetheless not apply BIA, this Court must determine what information should be applied for SKF's U.S. inland insurance expense. Although SKF reported that the correct base to which SKF's insurance rate should be applied was inventory value, Commerce applied the rate to unit price, calling it BIA. Commerce provided no explanation for choosing price over value or for rejecting the information provided by SKF. Upon consideration of the record, this Court can find no reason that Commerce should have chosen a price base in place of the cost base provided. Therefore, this Court finds that Commerce's application of the U.S. inland insurance rate reported in SKF's narrative submission to the unit price was not supported by substantial evidence. *See SKF USA Inc. and SKF GmbH*, 19 CIT at ___, Slip Op. 95-8 at 13; *see SKF USA Inc.*, 19 CIT at ___, Slip Op. 95-6 at 13. This issue is remanded for Commerce to apply SKF's U.S. inland insurance rate to inventory value.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for application of SKF's U.S. inland insurance rate to inventory value. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 95-14)

AIDA ENGINEERING, LTD., PLAINTIFF v. UNITED STATES, DEFENDANT, AND
VERSON DIV. OF ALLIED PRODUCTS CORP., DEFENDANT-INTERVENOR

Court No. 93-12-00819

[Plaintiff's motion for judgment on the agency record is denied. Defendant-intervenor's motion for judgment on the agency record is denied. Defendant-intervenor's motion to dismiss is granted.]

(Dated February 1, 1995)

Arent, Fox, Kintner, Plotkin & Kahn (Stephen L. Gibson and Christine L. Herrell), for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Harold D. Lester, Jr.*); United States Department of Commerce (*Patrick v. Gallagher, Jr.*), of counsel, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal and David C. Smith, Jr.), for defendant-intervenor.

MEMORANDUM AND ORDER

GOLDBERG, Judge: This matter comes before the Court on plaintiff's motion for judgment on the agency record. Defendant and defendant-intervenor oppose plaintiff's motion. Defendant-intervenor further moves for judgment on the agency record or, in the alternative, for dismissal of plaintiff's complaint.

BACKGROUND

On February 16, 1990, the Department of Commerce ("Commerce") issued an antidumping duty order relating to mechanical transfer presses from Japan (the "Order"). 55 Fed. Reg. 5642. The Order defined mechanical transfer presses as:

automatic metal-forming machine tools * * * [with multiple die stations] in which the workpiece is moved from station to station by a transfer mechanism designed as an integral part of the press and synchronized with the press action, whether imported as machines or parts suitable for use solely or principally with these machines. These presses may be assembled or unassembled.

Id. (Emphasis added).

On June 8, 1992, plaintiff Aida Engineering, Ltd. ("Aida") requested that Commerce exclude a certain mechanical press known as an FMX series cold forging press, with an optional transfer mechanism, from the scope of the Order. *Administrative Record ("AR") Doc. 7* at 1. Aida asserted that the FMX press fell outside of the scope of the Order because it could be used without the transfer mechanism. *Id.* at 4-5. In other words, Aida claimed that the FMX press had a non-essential transfer mechanism, rather than one which was an integral part of the press. *Id.*

In response to Aida's request, on or about July 27, 1992, Commerce initiated a formal scope inquiry regarding the FMX press with the optional transfer mechanism. *AR Doc. 10* at 1. During the scope inquiry, Commerce learned that it had modified the Order specifically to cover automatic metal-forming machine tools with "a transfer mechanism designed as an integral part of the press." *AR Doc. 36* at 5; 55 Fed. Reg. 335, 336 (Jan. 4, 1990). Commerce found that it made the modification at the request of petitioners in order to distinguish between those presses that were designed to operate as self-contained production lines and those presses that were retrofitted with transfer mechanisms which allowed them to pass workpieces from one press to another. *AR Doc. 36* at 8; *AR Doc. 3* at 11. Hence, Commerce did not make the modification in order to distinguish between presses with essential transfer mechanisms and presses with non-essential transfer mechanisms. *Id.*

When Commerce investigated the FMX press which served as the subject of Aida's scope request, it found that the FMX press was designed so that it could operate as a self-contained production line. *AR Doc. 36* at 8. More specifically, Commerce found that the FMX press was "custom-designed" as "an automatic metal-forming machine tool with multiple die stations, in which the workpiece is moved from station-to-station by a transfer mechanism" that is 'synchronized with the press action.' *Id.* Because the transfer mechanism was *designed as* an integral part of the FMX press, Commerce determined that it was of no consequence whether the transfer mechanism was in fact used. *Id.* On November 23, 1993, Commerce issued a final scope determination, ruling "that the cold forging FMX model press is within the scope of the order on mechanical transfer presses from Japan." *Id.* at 1.

On January 12, 1994, Aida wrote a letter to Commerce requesting clarification of the scope determination. *AR Doc. 38* at 1. Aida asserted that the language used in Commerce's determination was too broad. As a result, Aida believed that the Order could be read to include all FMX model presses, including those *without* the optional transfer mechanism. *Id.*

On June 9, 1994, Commerce responded to Aida's request as follows:

Our ruling stated that we considered the transfer feed mechanism to be an integral part of the FMX press because it was part of the machines [sic] custom design. The record of the scope inquiry in this case indicates that all FMX series presses have a transfer feed mechanism as an integral part of their design. If you believe that importation of the press without the physical presence of the transfer feed mechanism represents a materially different case than the one already decided by the Department you are welcome to file a request for scope clarification explaining the basis for this position.¹

¹ Annex 1 to Petitioner's Memorandum of Points and Authorities in Support of Plaintiff's 56.2 Motion for Judgment on the Agency Record ("Annex 1").

Aida did not file a request for scope clarification regarding the FMX press without transfer mechanism; therefore, Aida did not directly present Commerce with the issue of whether other variations of the FMX press fall within the scope of the Order. Instead, Aida decided to pursue this action before the Court.

In this action, Aida does not contest Commerce's scope determination to the extent that it holds that the FMX press with a transfer mechanism falls within the scope of the Order. Rather, Aida complains that Commerce's determination is overbroad in that it holds that all FMX presses, including those without the optional transfer mechanism, fall within the scope of the Order. Defendant and defendant-intervenor have responded to Aida's action by claiming, *inter alia*, that no case or controversy exists as to the whether Commerce's scope determination applies to the FMX press with an optional transfer mechanism, and that the Court does not have the power to issue an opinion advising as to whether or not the scope determination should be applied to an FMX press without an optional transfer mechanism.

DISCUSSION

Plaintiff asserts that the Court may exercise its jurisdiction pursuant to 19 U.S.C. § 1516a, which gives the Court jurisdiction to review certain scope determinations made by Commerce. Plaintiff fails to acknowledge, however, that the United States Constitution and 28 U.S.C. § 2637(d) also govern the manner in which this Court may exercise its power.

A. Cases or Controversies:

The United States Constitution limits the exercise of the power of federal courts to actual "cases" and "controversies." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937); *see also Torrington Co. v. United States*, 15 CIT 370, 371 (1991). In this instance, the Court finds that no case or controversy exists as to whether Commerce's November 23, 1993 scope determination covers a particular FMX press.

Commerce issued a scope determination regarding the custom designed FMX press, with the transfer mechanism, about which Aida inquired. This is demonstrated by the fact that Commerce recognized that Aida had only requested exclusion of "a certain cold forging FMX model press" from the Order. *AR Doc. 36* at 2 (emphasis added). In its scope determination, Commerce ruled "that the cold forging FMX model press is within the scope of the order on mechanical transfer presses from Japan." *AR Doc. 36* at 1 (emphasis added). When asked to clarify its determination, Commerce confirmed that it had included the FMX press within the scope of the Order because it "considered the transfer feed mechanism to be an integral part of * * * the machines [sic] custom design." *Annex 1* (emphasis added). Because neither Aida nor defendant-intervenor Verson Division of Allied Products Corp. ("Verson") contest Commerce's determination in as much as it holds that the Order covers the FMX press *with* the optional transfer mechanism, no case or controversy exists as to this issue.

Further, Aida's concern that the United States Customs Service may construe Commerce's scope determination to cover all FMX presses, regardless of whether they have an optional transfer mechanism, does not rise to the level of a justiciable controversy. This Court does not have the power to issue an opinion advising what the law would be under such a hypothetical set of facts. *Rose Bearings Ltd. v. United States*, 14 CIT 801, 802-03, 751 F. Supp. 1545, 1546-47 (1990). The Court will only review the ruling which Commerce made in a specific factual context; it will not decide questions concerning possible actions in other contexts. *See F.C.C. v. Pacific Foundation*, 438 U.S. 726, 734-35 (1978); *Rose Bearings*, 14 CIT at 802-03, 751 F. Supp. at 1546-47. In sum, because no case or controversy exists regarding Commerce's November 23, 1993 scope determination, the Court will not review that determination.

B. Exhaustion of Administrative Remedies:

Not only does lack of a case or controversy prevent the Court from reviewing Commerce's scope determination, the doctrine of exhaustion of administrative remedies also proscribes the Court from reviewing Commerce's determination at this time. In its role as a reviewing court, the Court would usurp an agency's function if it set aside an administrative determination on a ground not presented to the agency. *Nat'l Knitwear & Sportswear Assn. v. United States*, 15 CIT 548, 557, 779 F. Supp. 1364, 1372 (1991) (citations omitted). The Court would deprive the agency of the opportunity to consider the matter, make its ruling, and state the reasons for its actions. *Id.* Consequently, the Court requires a party to exhaust its administrative remedies, where appropriate, before bringing a civil action. 28 U.S.C. § 2637(d). Exhaustion of administrative remedies allows the agency and the parties to develop fully the administrative record upon which review is based. *Id.* (citing *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984)). In addition, it avoids duplication of fact finding, and in some cases judicial involvement, thereby promoting judicial economy. *Id.*

In this instance, the Court finds that Aida has failed to exhaust its administrative remedies. Instead of pursuing an action in this Court, Aida could have filed a request with Commerce to determine whether an FMX press without a transfer mechanism falls within the scope of the Order; indeed, Commerce recommended this course of action to Aida in its June 9, 1994 letter. In response to Aida's request, Commerce could have conducted a comprehensive scope inquiry regarding the FMX press without a transfer mechanism. However, because Aida has failed to exhaust its remedies, and because Aida has not shown that any exception to the exhaustion doctrine applies in this instance, review at this time would be inappropriate.

CONCLUSION

Commerce ruled that a particular FMX press fell within the scope of its antidumping duty order. Because neither Aida nor Verson contest this in their motions for judgment on the agency record, no case or controversy exists as to this issue. Moreover, Aida has failed to exhaust its

administrative remedies with regard to whether other variations of the FMX press also fall within the scope of Commerce's antidumping order. Therefore, the Court will not exercise jurisdiction as to this issue at this time. If Aida has further questions about the scope of the antidumping order, it should exhaust its remedies at the administrative level before bringing an action before this Court. Consequently, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record is DENIED; it is further

ORDERED that defendant-intervenor's motion for judgment on the agency record is DENIED; and it is further

ORDERED that defendant-intervenor's motion for dismissal of plaintiff's complaint is GRANTED. Judgment will be entered accordingly.

[NOTE: This is to advise that Slip Op. 95-15 is classified as confidential. A public version of Slip Op. 95-15 will be published when available.]

(Slip Op. 95-15)

AUSIMONT USA, INC. AND AUSIMONT S.P.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND E.I. DU PONT DE NEMOURS & CO., INC., DEFENDANT-INTERVENOR

(Court No. 93-05-00282)

(Dated February 1, 1995)

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C86/18 1/30/95 Aquilino, J.	General Instrument Corporation	92-07-00464	8529.90.50 5.9%	8529.90.35 3.7%	Agreed statement of facts	Nozzles Filters and Filter Modules
C86/19 2/1/95 DiCarlo, J.	Joan Baker Designs, Inc.	92-01-00694, 93-01-00017, 93-08-00482, 94-04-00209	7013.98.50 30% when valued over 30¢ but not over \$3.00 each	9701.10.00 Duty free	Agreed statement of facts	Los Angeles Imitation stained glass S/C (Sun catchers)



Index

Customs Bulletin and Decisions
Vol. 29, No. 8, February 22, 1995

U.S. Customs Service

Treasury Decision

	T.D. No.	Page
Bonds, Customs: New bonds underwritten by American Bonding Co., will be accepted	95-15	1

General Notices

Customs ruling letters:		Page
Tariff classification:		
Proposed modification; solicitation of comments:		
Certain disposable coveralls	6	
Pajama tops and bottoms	10	
Revocation:		
Cosmetic wipes	3	

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Aida Engineering, Ltd. v. United States	95-14	42
Ausimont USA, Inc. v. United States	95-15	46
RHP Bearings v. United States	95-12	28
SKF USA Inc. v. United States	95-11, 95-13	21, 35
Sumitronics Inc. v. United States	95-10	17

Abstracted Decisions

Classification	Decision No.	Page
	C95/18-C95/19	47



